No. 19-10651

In The
United States Court of Appeals
For The Eleventh Circuit

Darren Mickell,

Plaintiff/Appellant,

v.

Bert Bell/Pete Rozelle NFL Player Retirement Plan,

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLEE
The BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN

Michael L. Junk, Esq.
Groom Law Group, Chartered
1701 Pennsylvania Avenue NW
Washington, DC 20006
T: (202) 861-5430
F: (202) 659-4503
E: mjunk@groom.com

Counsel for Defendant-Appellee

Appeal Number: 19-10651-A
Case Style: Darren Mickell v. Bert Bell/Pete Rozelle NFL Player Retirement Plan

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P 26.1 and 11th Cir. R. 26.1-1, Appellee certifies that the following individuals, firms, and benefit plans have an interest in the outcome of the particular case or appeal.

1) **The Bert Bell/Pete Rozelle NFL Player Retirement Plan**

2) **Chmielarz, Melinda Liss**

   Disability Insurance Law Group

   3201 W Commercial Blvd Ste 227

   Fort Lauderdale, FL 33309

3) **Cohn, Hon. James I.**

   U.S.D.C. S.D. Fla.

4) **Disability Insurance Law Group**

   3201 W Commercial Blvd Ste 227

   Fort Lauderdale, FL 33309

5) **Groom Law Group, Chartered**

   1701 Pennsylvania Ave. NW

   Washington, DC 20006

6) Junk, Michael Lee

Groom Law Group, Chartered

1701 Pennsylvania Ave. NW

Washington, DC 20006

7) The NFL Player Disability & Neurocognitive Benefit Plan

8) Paulino-Grisham, Alicia

Disability Insurance Law Group

3201 W Commercial Blvd Ste 227

Fort Lauderdale, FL 33309

Appellee certifies that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

Dated: June 5, 2019

s/ Michael L. Junk
Counsel for Appellee

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary because this is a straightforward, ERISA-benefits case. The sole question is whether the plan administrator's decision was reasonable based on the record before it. Here, the administrator's decision is well supported by substantial evidence: It was predicated on the findings of ***seven*** independent, Neutral Physicians, all of whom personally evaluated Mr. Mickell, reviewed the records that were made available to them, and ultimately opined that he was ***not*** totally and permanently disabled.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

(1) Did the administrator of the Bert Bell/Pete Rozelle NFL Player Retirement Plan ("Plan") correctly interpret the Plan's total and permanent disability standard to mean that a participant is totally and permanently disabled if he is substantially unable to engage in any occupation?

(2) Did the Plan administrator have a reasonable basis to deny Mr. Mickell's application for total and permanent disability benefits, when (a) seven Neutral Physicians personally evaluated Mr. Mickell, reviewed his records, and opined that he was not totally and permanently disabled, and (b) the terms of the Plan state that the findings of those Neutral Physicians would be "substantial factors" in the administrator's decision-making?

STATEMENT OF THE CASE

This is a disability case under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). Mr. Mickell alleges the Retirement Board, the administrator of the Bert Bell/Pete Rozelle NFL Player Retirement Plan ("Plan"), abused its discretion when it denied his September 2013 application for total and permanent disability ("T&P") benefits.

I. The Plan

The Plan is a multiemployer plan that provides retirement, disability, and related benefits to eligible professional football players. Plan Doc. ("PD") Intro. [A0122].[1] It is the product of collective bargaining between the NFL Players Association (representing Players) and the NFL Management Council (representing NFL owners), PD Intro. [A0122], and is subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 141, *et seq*. ERISA is the "comprehensive and reticulated statute" governing employee benefit plans. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361

[1] Bracketed cites like "[A0122]" refer to pages in the appendix to Appellee's brief. The cites generally refer to pages within the administrative record provided to and relied on by the district court. In his appeal brief, Mr. Mickell calls the administrative record "the purported claim file." App. Br. at 1, n.1. It is unclear why. Throughout the course of this litigation, Mr. Mickell never pointed to any deficiency in the record, moved to supplement it, or questioned it in any way.

(1980). The LMRA complements ERISA and allows a multiemployer plan to be jointly administered by an equal number of employee and employer representatives, 29 U.S.C. § 186(c)(5)(B), which in this case is the Retirement Board.

The Board is the Plan's "'named fiduciary' within the meaning of ERISA section 402(a)(2), and [it is] responsible for implementing and administering the Plan." PD § 8.2 [A0157]. The Board consists of three voting members appointed by the NFL Management Council, and three voting members appointed by the NFL Players Association—all of whom are former NFL players just like Mr. Mickell. *See* PD § 8.1 [A0157] (explaining structure of the Board); 8/18- 8/19/15 Meeting Minutes [A1480] (identifying the members of the Board)]. Because "any action by the Retirement Board… require[s] at least four affirmative votes," PD § 8.7(a) [A0161], equal representation by NFL Management Council appointees and NFL Players Association appointees ensures that neither group can unilaterally control the Board or its decisions.

The Plan grants the Board "full and absolute discretion, authority and power to interpret, control, implement, and manage" the Plan, PD § 8.2 [A0157], including discretionary authority to decide claims for benefits.[2] *See* PD § 8.2(c)

[2] The Disability Initial Claims Committee ("Committee") decides initial claims for disability benefits. PD § 8.5 [A0160]; PD § 8.2(c) [A0158]. The Committee has

[A0158] (granting Board authority and power to "[d]ecide claims for benefits"); *id*. § 8.9 [A0161] (giving the Board "the broadest discretion permissible under ERISA and any other applicable laws," and stating that, "[i]n deciding claims for benefits under this Plan, the Retirement Board… will consider all information in the Player's administrative record, and [it] shall have full and absolute discretion to determine the relative weight to give such information").

Under the Plan's "General Standard" for determining total and permanent disability, a participant ("Player") is entitled to T&P benefits if the Board finds that "he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment." PD § 5.2(a) [A0143]. *See also* PD § 5.1 [A0143] (a Player is eligible for T&P benefits if he "is determined by the Retirement Board… to be totally and permanently disabled").[3] In describing the General Standard, the Plan also states:

---

two main members: one appointed by the NFL Management Council, and the other appointed by the NFL Players Association. PD § 8.4(a) [A0159]; *see also id*. § 8.6 [A0160] (explaining that a third Committee member will vote in the event of a deadlock between the two primary members). Players may appeal Committee decisions to the Board, which reviews and decides claims *de novo*. PD § 12.6 [A0170].

[3] The Plan offers four categories of T&P benefits depending on factors such as the nature, timing, and cause of a Player's total and permanent disability. *See* PD § 5.3 [A0144- 45] (describing the categories of T&P benefits).

> The educational level and prior training of a Player will not be considered in determining whether such Player is "unable to engage in any occupation or employment for remuneration or profit." A Player will not be considered to be able to engage in any occupation or employment for remuneration or profit within the meaning of this Section 5.2 merely because such person is employed by the League or an Employer, manages personal or family investments, is employed by or associated with a charitable organization, is employed out of benevolence, or receives up to $30,000 per year in earned income.

PD § 5.2 [A0143].

When deciding a Player's application for T&P benefits, the Board may refer a Player for an evaluation with one or more physicians selected by the Plan. PD § 5.2(c) [A0144]. The Plan refers to these physicians as "Plan Neutral Physicians," PD § 11.3 [A0165- 66], because they are neutral as between the employer and employee representatives, the Player and the Plan, and as to the ultimate outcome of the benefit determination.. Although retained and compensated by the Plan, Neutral Physicians are instructed and contractually obligated to evaluate Players fully, fairly, and without bias; they are compensated on a flat-fee basis, irrespective of the outcome of their evaluation(s); and they are jointly approved by both sides of the Board, *i.e.*, the members appointed by the NFL Management Council and the members appointed by the NFL Players Association. *See* PD § 11.3(a) [A0166] (Plan Neutral Physicians "serve until three members of the Retirement Board agree to remove that Neutral Physician"); Decl. of Hessam Vincent ¶¶ 6-10

[A1493- 94] (Plan Neutral Physicians are obligated to evaluate Players fully, fairly, and without bias, and they are compensated under fixed-fee contracts).

In light of the Plan Neutral Physicians' impartiality and collective experience evaluating Players for the Plan, the Plan dictates that "Neutral Physician reports… will be substantial factors" in the Board's decision-making. PD § 11.3(b) [A0166].

II. Mr. Mickell's Application For Benefits

In September 2013, Mr. Mickell applied for T&P benefits based on orthopedic impairments. *See* 9/17/13 Application [A0208] (describing impairments to knees, hips, back, and shoulders). He did not provide any medical records in support of the application, and he indicated that he was working full-time as a freight handler. *See* 9/17/13 Application [A0208] (Mr. Mickell did not include, and did not intend to include, any additional documents and information beyond the four-page T&P application); *id.* [A0210] (noting that Mr. Mickell was employed with FHI as a freight handler); 9/4/13 Ltr. fr. FHI, LLC [A0215] (Mr. Mickell was then employed full-time as a freight handler). The Disability Initial Claims Committee denied the application in light of Mr. Mickell's admitted employment [A0228- 29].

Several months later, Mr. Mickell's attorneys appealed the Committee's decision and, on multiple occasions thereafter, requested additional time to collect

and submit documentation. *See* 2/4/14 Ltr. fr. M. Chmielarz [A0246- 47] (noting intent to appeal); 2/4/14 Ltr. fr. A. Anillo [A0249] (Plan counsel confirming timely appeal); 3/11/14 Ltr. fr. M. Chmielarz [A0251] (requesting delay); 5/8/14 Ltr. fr. M. Chmielarz [A0253] (requesting delay). The Plan honored those requests.

In May 2014, the Board considered Mr. Mickell's appeal for the first time. As an interim measure, the Board reversed the Committee's initial denial to the extent that the denial was based on Mr. Mickell's employment, and referred Mr. Mickell for an evaluation with a Plan Neutral Physician [A0276].

Dr. Chaim Arlosoroff, a Plan Neutral orthopedist, evaluated Mr. Mickell in June 2014 [A0882]. The evaluation included a medical history; a thorough physical examination; and radiographic imaging of Mr. Mickell's spine, shoulders, hips, knees, and ankles. *See* 6/17/14 Narrative Report [A0884- 87] (describing evaluation). Dr. Arlosoroff concluded that Mr. Mickell was **not** totally and permanently disabled:

> [Mr. Mickell] is not totally disabled to the extent that he is substantially unable to engage in any occupation for remuneration [or] profit. [Mr. Mickell] can engage in any type of light to moderate duty work. He should avoid employment which requires repetitive kneeling, squatting, and/or climbing stairs. He should also avoid employment which requires climbing ladders or being in unprotected heights. In addition, he should try to avoid positions which require repetitive heavy lifting, especially those above shoulder height [A0887].

See also Physician's Report Form [A0883] (indicating that Mr. Mickell is not totally and permanently disabled).

On the very same day that Dr. Arlosoroff's evaluation took place, Mr. Mickell's attorneys mailed in the first medical records in support of his application; the Plan received the records two days later. *See* 6/17/14 Ltr. fr. M. Chmielarz [A0292- 876] (forwarding records, received on 6/19/14). The records included reports from Dr. Craig Lichtblau, a physiatrist retained by Mr. Mickell, following assessments conducted in March and April 2014 [A0293, *et seq*.]; a report from Mark Todd, a psychologist retained by Mr. Mickell, concerning a neuropsychological evaluation conducted in April 2014 [A0368]; and medical records from Mr. Mickell's former NFL teams [A0385, *et seq*.]. In a summary report, Dr. Lichtblau stated:

> It is my belief that this patient does not have the functional capacity to work 4 hours per day on an uninterrupted basis at this time. He should be in a job setting which allows him to take breaks to change positions from sit-to-stand/stand-to-sit frequently at will for positional comfort. He may sit, stand, and walk as tolerated. He may perform limited bending, limited reaching overhead, limited pushing and pulling. He should avoid kneeling, squatting, climbing unprotected heights, running, and jumping. His estimated physical demand characteristics from the hips-to-overhead position should remain at the light level, which is specifically defined by the Dictionary of Occupational Titles as lifting 20 lbs. infrequently and 10 lbs. or less frequently. This patient should always observe appropriate body mechanics which includes, but is not limited to, never bending at his waist while keeping his hips and knees extended.

> It should be understood this patient is going to suffer from acute, intermittent exacerbations of chronic pain and discomfort and, when he experiences these acute, intermittent exacerbations of pain and discomfort, he will have good days, bad days, and missed days of work.
>
> It is my medical opinion, as a Board Certified Physiatrist, this patient will be unable to maintain gainful employment in the competitive open labor market or in a sheltered environment with a benevolent employer, secondary to acute, intermittent exacerbations of chronic pain [A0341].

Dr. Todd summarized the results of neuropsychological testing:

> Assessment of mood functioning with the MMPI-IRF revealed evidence of marked mood symptoms with depression, anxiety, and worry. He is also admittedly fearful about his future.
>
> Neuropsychological testing together with educational, employment, and life history indicates an individual of overall premorbid mental abilities in the average to low average range. He continues to demonstrate average to low average reading recognition, written arithmetic, verbal abstract reasoning, expressive vocabulary, fund of information, attention and concentration, visual discrimination, visual constructional ability, nonverbal reasoning, letter fluency, and categorical fluency. Naming might be slightly low.
>
> On the other hand, tests of processing speed clearly reveal some slowing, as the scores are low average to borderline. Verbal executive functioning is functioning is average. Nonverbal executive functioning is low average. Sustained attention is average.
>
> While visual construction ability is average, visual organizational ability is clearly less than expected. With regard to memory skills, new learning and short-term memory of semantic discourse is average; however, rote verbal learning seems less than expected. Visual learning is average. His short-term memory is low average. On another rote visual learning task, his performance is clearly above average, but short-term memory is only borderline.

> Testing indicated evidence of good motivation.
>
> Impression:
>
> Overall, the patient's neuropsychological profile appears to provide evidence of a mild cognitive disorder. He clearly has less than expected memory for visual information as well as problems with rote verbal learning. He may have some slightly less than expected cognitive efficiency with mild slowing and perhaps some mild difficulties with visual perceptual analysis.
>
> The etiology of his impairment is less clear. Certainly, his mood symptoms are a prominent problem that could contribute to and may even account for his difficulties. The concern would be, however, that his problems may also be more reflective of a significant cognitive disorder related to a potential history of multiple concussive injuries. Certainly, given his history of ongoing depression with some behavioral dyscontrol as well as cognitive complaints, there are concerns that his current difficulties may represent a more significant issue.
>
> Recommendations: ….
>
> His mood and behavior together with his physical problems and cognitive difficulties make competitive employment at this point quite difficult. It is recommended that he obtain assistance in trying to reduce some of the effects of these variables, which might make him able to participate in a competitive employment on a more regular basis. Unfortunately, these variables are likely to prohibit him from consistently attending work or completing work requirements [A0380- 82].

In late June 2014, Mr. Mickell's attorneys supplemented Mr. Mickell's appeal with a 44-page letter explaining why they felt the Committee's initial determination was incorrect [A0896- 971]. The letter argued, in part, that Mr. Mickell's annual income fell below the Plan's $30,000-per-year threshold for

earned income, and therefore the Committee should not have denied Mr. Mickell's application due solely to his employment [A0903- 05]. In response, Plan counsel clarified that, because the Board had overturned the Committee's initial decision, Mr. Mickell's application would be re-presented to the Committee so that it could review the expanding medical evidence and decide Mr. Mickell's claim for benefits on that basis [A0973- 74]. Plan counsel explained that "by allowing the [Committee] to evaluate this aspect of Mr. Mickell's claim, we will preserve his right to appeal any adverse decision to the Board, and thereby ensure a full administrative review of his claim for T&P benefits" [A0973].

Plan Neutral neurologist Dr. Barry McCasland then evaluated Mr. Mickell [A1002]. On the Plan's standardized Physician's Report Form, Dr. McCasland indicated that Mr. Mickell was **not** totally and permanently disabled, and he explained that Mr. Mickell had "no limits from [a] neurologic standpoint," although his "premorbid estimates of function are not consistent with academic professions" [A1003]. Dr. McCasland provided a narrative report that described the examination and his findings in greater detail [A1004- 09]. Dr. McCasland noted that Mr. Mickell may have a "chronic headache disorder with [a] mild headache burden," "very mild cognitive impairment," and "significant depression and [an] anxiety disorder which either accounts for or contributes to" his mild cognitive impairment [A1008].

The day after Dr. McCasland's evaluation, Plan Neutral neuropsychologist Dr. Stephen Macciocchi evaluated Mr. Mickell [A1012]. On the Physician's Report Form, Dr. Macciocchi indicated that Mr. Mickell was **not** totally and permanently disabled from a cognitive perspective, and noted that Mr. Mickell was currently working with his friend three days each week [A1013].[4] In a narrative report, Dr. Macciocchi described his interview with Mr. Mickell, the neuropsychological tests he administered, and the results of that testing. Dr. Macciocchi concluded:

> Darren Mickell has a history of chronic pain, which is a risk factor for cognitive inefficiency. He also reports symptoms of anxiety and depressive disorders, which are also risk factors for cognitive inefficiency, although the severity his psychological health disorders are difficult to determine due to symptom over-reporting. Nonetheless, he has a self-reported history of significant weight loss, apathy, social isolation and panic symptoms. Whether his use of THC for pain relief has had an impact on his cognitive functioning is not entirely clear since research has not definitively shown that THC use has a chronic, deleterious effect on cognition.
>
> Mr. Mickell also has a history of what he reported to be at least 2 concussions and he reportedly experienced numerous other head contact injuries during his time in the NFL that resulted in transitory changes in mental status. The long term impact of multiple concussive injuries on cognitive functioning has not been extensively studied, despite recent, appropriate attention to the effects of these injuries. Consequently, based on existing science, determining the effect head contact injuries have on individual NFL players cognitive

[4] *See also* 8/20/14 Narrative Report [A1016] (noting that Mr. Mickell was "working with a friend supplying video games to various establishments"). In later submissions, Mr. Mickell claimed this was untrue [*e.g.*, A1035].

functioning is difficult if not impossible to quantify, except when there is evidence of a reliable decline in cognitive functioning over a sustained period of time documented by valid neurocognitive test performance. These findings would need to be obtained in the absence of other more common disorders known to have a negative impact on cognition such as pain, sleep and psychiatric disorders as well as unreliable test findings due to suboptimal effort or malingering. In any case, media reporting of single case studies and other anecdotal evidence regarding the effect of multiple concussions has raised concerns about neurological health among many athletes, not just NFL players. Consequently, NFL players are experiencing reasonable anxiety regarding their neurological health. Anxiety is known to negatively impact cognitive efficiency and result in the subjective experience of cognitive dysfunction.

For instance, in terms of psychological health, Mr. Mickell reports symptoms of major depression and panic disorder in part related to his concerns about his health. He is considerably worried about his physical and neurological health. He reports changes in behavior and mood that have affected his everyday functioning. While there is self-report evidence Mr. Mickell is experiencing symptoms of major depression, and panic disorder, his MMPl-2RF is difficult to interpret due to symptom over-reporting on validity metrics, which raises concerns about the reliability of any self-report measures that do not have embedded symptom validity scales such as the BDI and BAI. Consequently, even though Mr. Mickell reports numerous clinically suggestive psychological health problems, the severity of his psychological health problems and implications for his ability to engage in competitive employment remains to be determined.

In terms of cognitive complaints, Mr. Mickell's scores on performance validity measures were impaired. Impaired scores on performance validity metrics have been shown to be strongly associated with lowered neuropsychological test performance. In other words, research has shown that persons who evidence impaired scores on freestanding performance validity measures score much lower on neuropsychological tests compared to cohorts with similar medical histories who perform well on performance validity tests (above empirically established cutoffs). Consequently, Mr. Mickell is most likely functioning at a higher cognitive level than was

documented during his current examination. Nevertheless, Mr. Mickell did not evidence other signs of performance invalidity, such as pervasively impaired neuropsychological test performance that deviates from known patterns of brain functioning, other than in the area of memory functioning.

In other words, despite concerns about performance validity during the current assessment, Mr. Mickell did not evidence an abnormal number of low scores. Presuming Mr. Mickell's predicted Full Scale IQ on the TOPF is accurate, research has shown that 78% of persons with low average IQ in standardization samples have 5 or more scores fall below T=40 when administered neuropsychological batteries with 36 scores. The current test battery has approximately 60 scores and Mr. Mickell had 6 scores that fell below T=40, which is not psychometrically or statistically unexpected, especially given concerns about performance validity. More importantly, when focusing on skills necessary for day to day and employment functioning such as processing speed and executive skills, Mr. Mickell performed in the average to high average range.

In contrast, Mr. Mickell's memory test performance was less proficient during the current examination and more impaired relative to his performance 4 months ago. When comparing Mr. Mickell's current memory test scores with his previous examination completed 4 months ago, his memory test performance declined significantly on story memory tasks, but improved on list learning tasks. His decline in story memory over such a brief period of time is most likely due to performance validity problems and/or exacerbation of psychiatric symptomatology.

In summary, there are questions regarding the reliability and validity of Mr. Mickell's neurocognitive and psychological health test findings. Despite concerns about the reliability and validity of neurocognitive test scores, Mr. Mickell did not evidence an abnormal number of impaired scores compared to expectations derived from normative data bases. He did evidence a decline in memory test performance over the past 4 months, which cannot be explained by declining neurological health, but may be due to psychiatric problems and/or suboptimal engagement on memory tests during the current examination. Even when considering validity issues, there is no

> current psychometric evidence Mr. Mickell cannot engage in gainful employment solely from a cognitive perspective. Whether Mr. Mickell's medical problems such as chronic pain or a psychiatric disorder, most likely major depression and panic disorder, would prevent him from working cannot be definitively determined by the current examination. There is clinically suggestive evidence he may have a major depressive disorder and a panic disorder, which could impair his ability to secure and maintain successful employment. Consequently, Mr. Mickell will need formal medical and psychiatric examinations to assess the reliability and significance of his physical/pain disorders and psychiatric condition. If obtained, a psychiatric examination must consider symptom validity and response bias in the context of any self-reported symptoms [A1019- 20].

On September 8, 2014, the Committee reconsidered Mr. Mickell's application and unanimously denied it, relying on Dr. Arlosoroff's, Dr. McCasland's, and Dr. Macciocchi's shared conclusion that Mr. Mickell was capable of employment [A1032- 33].

Three days later, Mr. Mickell's attorneys submitted a statement from Mr. Mickell accusing all of the Plan Neutral Physicians of conducting cursory evaluations [A1035- 38]. In March 2015, Mr. Mickell formally appealed the Committee's determination [A1050- 1289]. The appeal renewed Mr. Mickell's criticism of all three Plan Neutral Physicians and their opinions [A1060- 62] and recited the contrary conclusions of Mr. Mickell's retained consultants, Dr. Lichtblau and Dr. Todd (discussed above) [A1062- 69].

On appeal, Mr. Mickell was referred for additional Plan Neutral evaluations with three new Plan Neutral Physicians in April 2015.[5] Plan Neutral orthopedist George Canizares evaluated Mr. Mickell and concluded that he was **not** totally and permanently disabled [A1368- 69]. Dr. Canizares stated:

> I think under the circumstances, it is my feeling that this gentleman probably can conduct himself in a light duty work capacity. This job would require him to alternate sitting and standing and walk short distances. He can also drive. I do not feel he is able to conduct himself in any capacity beyond that due to his current orthopedic illness[es] which include his neck and back, which have evidence of degenerative herniated disc, shoulders with some early degenerative changes, his right hip with a labral tear, and his bilateral knees with moderate patellofemoral DJD [A1374].

Plan Neutral neurologist Dr. Peter Dunne reported that Mr. Mickell was **not** totally and permanently disabled [A1340- 41]. Dr. Dunne explained that

---

[5] Department of Labor claim regulations provide that, when "deciding an appeal of any adverse benefit determination that is based in whole or in part on a medical judgment,… the appropriate named fiduciary shall consult with a health care professional who has appropriate training and experience in the field of medicine involved in the medical judgment." 29 C.F.R. § 2560.503-1(h)(3)(iii) (as amended July 9, 2001). The regulations also require that "the health care professional engaged for purposes of a consultation… shall be an individual who is neither an individual who was consulted in connection with the adverse benefit determination that is the subject of the appeal, nor the subordinate of any such individual." 29 C.F.R. § 2560.503-1(h)(3)(v) (as amended July 9, 2001). For this reason, the Plan refers Players for additional neutral evaluations, with different neutral physicians, when a Committee decision is appealed to the Board. *See* PD § 12.6(a) [A0170] ("If a claim involves a medical judgment question, the health care professional who is consulted on review will not be the individual who was consulted during the initial determination or his subordinate, if applicable.").

"[n]eurologically Mr. Mickell has no deficits other than absent ankle jerks. He may have mild cognitive problems but they should not impact neurologically his employability" [A1342]. *See also* 4/14/15 Narrative Report [A1342] (noting that neuropsychological examination by Dr. Todd "[b]asically concludes as I do that he: 'does have a mild cognitive disorder.'").

Plan Neutral neuropsychologist Sutapa Ford concluded that Mr. Mickell was **not** totally and permanently disabled [A1379- 80]. Dr. Ford summarized the overall results of her evaluation:

> Mr. Mickell presented for a neuropsychological evaluation to determine eligibility for total and permanent disability benefits. Mr. Mickell failed all free-standing and embedded validity scores, performing at levels suggestive of significant exaggeration. Based on clinical observation and psychometric data, this may be due to elevated psychiatric distress and pain although the possibility of intentional exaggeration of symptoms cannot be entirely ruled out.
>
> Despite poor performance on validity measures, cognitive scores were generally intact to mildly impaired. Comparison of Mr. Mickell's test scores to the August 2014 scores revealed consistency in performance across time. Mr. Mickell displayed mild fluctuations in test performance which is expected as part of normal variance in clinical scores. It is also common as his performance is likely influenced by psychiatric dysfunction, poor effort, pain or some combination thereof. Psychological testing revealed major depression and significant anxiety with evidence of symptom exaggeration.
>
> From a neurocognitive standpoint, there is insufficient evidence supporting the notion that Mr. Mickell is incapable of full-time employment as his scores are generally intact or mildly diminished. More significant to his functional capacity is psychiatric dysfunction, and it is therefore recommended that Mr. Mickell undergo a thorough psychiatric assessment which includes validity testing and formal

> assessment of response biases. Mr. Mickell's self-reported cognitive complaints are likely secondary to other factors, rather than neurological dysfunction, and may therefore improve with targeted treatment [A1384].

Following the Plan Neutral evaluations, Mr. Mickell's attorneys submitted six pages of handwritten notes and lab results from Mr. Mickell's "treating physician" [A1357- 63]. The records—which were largely irrelevant—did not identify the treating physician, and no other records from him or her were ever submitted in conjunction with Mr. Mickell's application for T&P benefits.

Later, Mr. Mickell's attorneys alleged that Plan Neutral neuropsychologist Dr. Ford rushed her evaluation and did not complete an interview with Mr. Mickell [A1365- 66]. Dr. Ford responded to these allegations, explaining in part:

> My recollection of events differs from Ms. Chmielarz's account, and I am happy to provide information which may clarify the matter. Due to examinee-related issues that arose during testing on April 27th, we divided the clinical interview into two sessions – April 27th (in-person) and April 29th (phone call). During my face-to-face interaction with Mr. Mickell, I formulated behavioral observations which are documented in the full report and incorporated in my interpretation and conclusions. I will address Ms. Chmielarz's points below[,] however, the results of Mr. Mickell's evaluation are conclusive and supported by psychometric data [AR-1260].

At its quarterly meeting in May 2015, the Board reviewed Mr. Mickell's appeal and decided to refer him to a Plan Neutral psychiatrist [A1440]. Before that evaluation took place, however, Mr. Mickell saw a psychologist of his own

choosing, Peggy Vermont, who opined that "[d]ue to the severity of his mood and anxiety symptoms, Mr. Mickell is not deemed employable at this time" [A1457].

In July, Plan Neutral psychiatrist Dr. Raymond Faber evaluated Mr. Mickell and reported that he was **not** totally and permanently disabled [A1462- 63]. Dr. Faber issued a narrative report that discussed Mr. Mickell's complaints, his background and employment history, his medical and psychiatric history, and the results of Dr. Faber's examination:

> MENTAL STATUS EXAMINATION: Mr. Mickell appears to be his stated age. He has a muscular build though he walks with a slight limp. He made good eye contact and paid close attention to all that I said. He was casually though neatly attired. He occasionally stood up briefly to stretch his legs. His speech was quite understandable and his vocabulary is more than adequate. He had no difficulty understanding my questions and his responses were always on the point. His mood was often sullen. His affect was generally intense and at times labile depending on the subject being discussed. He did not appear to be anxious during my interview though he emphasized anxiety being an ongoing problem. He expressed frustration and was dejected by his ongoing difficulty in getting a disability awarded. He is very pessimistic about being able to sustain employment but does not express regret about this. He has had no thoughts of harming himself but described unfocused thoughts about hurting the NFL. He denied experiencing psychotic symptoms, but is preoccupied about getting a disability award for which he feels extremely entitled. Mr. Mickell has very limited insight into factors contributing to his complaints. His judgment is inconsistent as he is following a logical course in pursuing a disability yet at the same time eschews medication while using marijuana daily.
>
> COGNITIVE EVALUATION: Mr. Mickell was well aware of the purpose of my evaluation. He travelled unassisted to San Antonio and found my office without difficulty. Because he had had extensive

> neuropsychological testing, I saw no need to formally assess his cognition given his vocabulary and cogent thought.
>
> DIAGNOSIS: Depression and anxiety not otherwise specified.
>
> RECOMMENDATION: Though Mr. Mickell has psychological difficulties which have an effect on his functioning, I do not consider them to rise to a level which precludes some kind of employment. At this juncture I would offer two suggestions for Mr. Mickell. He would be well-served to engage in psychotherapy to help him gain insight into his personality and to develop more realistic expectations. Mr. Mickell greatly downplays his abilities and assets while he amplifies his difficulties. He has many positive qualities which he seriously undervalues. Secondly, Mr. Mickell should seek the services of a vocational counsellor for career guidance [A1466- 67].

Mr. Mickell then visited another psychologist of his own choosing, Rosa Gonzalez, who opined that Mr. Mickell was unemployable until he "cope[d] with his anxiety and depression to the point where he [could] attempt a return to work" [A1475].

On August 19, 2015, the Board reviewed all of the foregoing evidence and unanimously denied his application for T&P benefits [A1480- 84 (noting that Board's decision was unanimous); A1486- 90 (Board decision letter)]. The Board considered the evidence that Mr. Mickell and his attorneys submitted, but determined—in its discretion—to place greater weight on the findings of the seven Plan Neutral Physicians who reviewed his records, evaluated him, and uniformly reported that he was capable of employment despite his claimed impairments [A1486- 90 (Board decision letter discussing the Board's assessment of the

evidence)]. The Board also considered, and rejected, the accusations levied by Mr. Mickell's attorneys against all of the Plan Neutral Physicians [A1490].

III. This Litigation And The District Court's Decision

Mr. Mickell brought suit in October 2015 [A0013]. After an initial round of mediation, the parties jointly moved to stay the litigation pending Mr. Mickell's pursuit of Social Security disability benefits. *See* 4/7/16 Joint Mot. to Stay Proc. (ECF 21).[6]

In August 2018, the district court reopened the litigation. 8/30/18 Order Reopening Case & Requiring Joint Status Rpt. (ECF 47). The parties filed dispositive briefs in November 2018.

On January 15, 2019, the district court granted the Plan's motion for judgment on the administrative record and entered judgment in favor of the Plan. 1/15/19 Order on Parties' Disp. Mots. (ECF 60, [A1546- 71]); 1/15/19 Final Judgment (ECF 61, [A1572]). The court rejected Mr. Mickell's argument that the Board applied an incorrect or more stringent standard for T&P benefits than called

[6] Mr. Mickell's brief gratuitously references the parties' joint motion to stay because it allows him to also say that the Social Security Administration awarded him disability benefits in November 2017, more than two years after he instituted this litigation. App. Br. at 3-4. For the reasons explained in the district court's decision [A1559- 62], the Social Security determination is not part of the administrative record, and it is immaterial to whether the Board reasonably denied Mr. Mickell's September 2013 application for T&P benefits. Mr. Mickell does not challenge either of these rulings on appeal.

for by the terms of the Plan. The court concluded that "the only reasonable interpretation of the Plan's disability standard is the interpretation advanced by Defendant," because "[t]he plain language of the Plan [*i.e.*, its any-occupation standard] clearly does not require the Board to determine whether a Player is capable of working in a job that earns him more than $30,000 per year" [A1563]. The district court also rejected Mr. Mickell's argument that the Board's decision was arbitrary and capricious: "Given that the administrative record includes the comprehensive reports of ***seven*** Plan Neutral Physicians (including two orthopedists, two neurologists, two neuropsychologists, and one psychiatrist) that evaluated Plaintiff and ***unanimously*** concluded that he was capable of employment, it is clear that Defendant's decision to deny T&P benefits was not arbitrary and capricious" [A1564 (emphasis in original)].

Mr. Mickell appealed the district court's decision on February 14, 2019.

STANDARD OF REVIEW

This Court reviews the district court's decision *de novo*, applying the same standard of review to the Board's decision as the district court. *Blankenship v. Metro. Life Ins. Co.*, 644 F.3d 1350, 1354 (11th Cir. 2011).

This Circuit often employs a six-step framework to review a plan administrator's decision. *Blankenship*, 644 F.3d at 1355. But here, because the Board has full discretionary authority and no conflict of interest, the arbitrary-and-

capricious standard of review applies, and the dispositive question is whether the Board's decision—based on the evidence before it at the time—was reasonable. *See Boyd v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 796 F. Supp. 2d 682, 690-91 (D. Md. 2011) (noting that every district court in Maryland to address the issue has found no conflict on the part of the Board);[7] PD § 8.2 [A0157- 59] (granting discretionary authority); *Frame v. Hartford Life & Acc. Ins. Co*., 257 F. Supp. 3d 1268, 1274 (M.D. Fla. 2017) ("It is undisputed that Hartford was vested with discretion. Therefore, even assuming that [Hartford's] decision was '*de novo* wrong'... the dispositive question is whether [Hartford's] decision was arbitrary and capricious.") (internal quotation marks and citations omitted);[8] *Blankenship*,

---

[7] *See also Johnson v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 468 F.3d 1082, 1086 (8th Cir. 2006) ("[T]here is no conflict of interest."); *Courson v. Bert Bell NFL Player Ret. Plan*, 75 F. Supp. 2d 424, 431 (W.D. Pa. 1999), *aff'd*, 214 F.3d 136 (3d Cir. 2000) ("[W]e find that there is no conflict of interest which requires special attention or a more stringent standard of review under *Firestone*.").

[8] *See also Campbell v. Hartford Life. & Acc. Ins. Co*., 2018 WL 4963118, *7 (S.D. Fla. Oct. 15, 2018) (where plan unambiguously grants the administrator discretionary authority, "the Court will begin the analysis at step three of the Eleventh Circuit's framework because even assuming that [Defendant's] decision was *de novo* wrong… the dispositive question is whether [Defendant's] decision was arbitrary and capricious") (internal quotation marks omitted; alteration in original); *Dawson v. Cigna Corp*., 261 F. Supp. 3d 1275, 1284-85 (S.D. Fla. 2017) ("If LINA had discretionary authority, then the ultimate question would be whether reasonable grounds supported that decision; in other words, whether LINA's decision was arbitrary and capricious. The Eleventh Circuit has held that *de novo* review is necessary unless the plan expressly provides the administrator discretionary authority to make eligibility determinations or to construe the plan's

644 F.3d at 1354 ("Review of the plan administrator's denial of benefits is limited to consideration of the material available to the administrator at the time it made its decision"). "The deference is due both for the [Board's] plan interpretations and for [its] factual determinations." *Blankenship*, 644 F.3d at 1355, n.6.

SUMMARY OF THE ARGUMENT

The Plan grants the Board "full and absolute discretion, authority and power" to interpret the Plan and decide claims for benefits. PD § 8.2 [A0157- 58]. As required by the Taft-Hartley Act, the Board is made up of equal numbers of employee and employer representatives. PD § 8.1 [A0157]. Under these facts, it is well-settled law that the Board has no conflict of interest and that its decisions are entitled to the highest degree of deference permitted by ERISA. The fundamental question in this case is whether the 2015 decision of the Board was reasonable.

The Court should reject Mr. Mickell's argument that the Board applied an incorrect disability standard. The Plan provides T&P benefits where a Player "has

---

terms.") (internal quotation marks and citations omitted); *Howard v. Hartford Life & Acc. Ins. Co.*, 929 F. Supp. 2d 1264, 1287-88 (M.D. Fla. 2013) (noting that arbitrary-and-capricious standard of review applies where plan administrator has discretionary authority, and question for the court is whether the administrator's decision had a reasonable basis), *aff'd*, 563 Fed. App'x 658 (11th Cir. 2014).

become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment." PD § 5.2(a) [A0143]. To accommodate Players who may receive occasional funds from autographs or appearance fees, the Plan provides that a Player is not disqualified from receiving T&P benefits "merely because such person... receives up to $30,000 per year in earned income." PD § 5.2 [A0143]. Mr. Mickell argues that the Board was required to find that he could earn more than $30,000 a year, but that is not and has never been the Plan's standard. The District Court held that "the only reasonable interpretation of the Plan's disability standard is the interpretation advanced by Defendant," and noted that, even if the Plan language were ambiguous, "Defendant's interpretation is undoubtedly reasonable" [A1563].

The Court should also reject Mr. Mickell's argument that the Board had no reasonable basis for its decision. The evidence before the Board was mixed. Mr. Mickell and his attorneys provided a variety of doctor statements and medical reports, some of which indicated that Mr. Mickell was unable to work. However, the Plan provides that Players seeking disability benefits should be examined by doctors approved by both sides of the Board—by both employer and Player representatives. The Plan refers to these doctors as "Neutral Physicians." Neutral Physicians are required by contract to evaluate Players fully, fairly, and without bias, and are compensated on a flat-fee basis without regard to their conclusion.

Through the course of his initial application and appeal, Mr. Mickell was examined by seven Neutral Physicians—two orthopedists, two neurologists, two neuropsychologists, and one psychiatrist. Each Neutral Physician reviewed the evidence from Mr. Mickell and his attorneys and physicians, and provided a comprehensive report. ***All seven*** Neutral Physicians stated that Mr. Mickell was able to work. The District Court held that, under these facts, "it is clear that Defendant's decision to deny T&P benefits was not arbitrary and capricious" [A1564].

In sum, the issue is not whether the medical evidence was in conflict. It was. The issue is whether the 2015 decision of the Retirement Board was reasonable. Seven Neutral Physicians thoroughly examined Mr. Mickell and concluded he was able to work. If the arbitrary and capricious standard has any meaning, it means that, under these facts, the decision of the Board should be upheld.

The district court's decision should be affirmed in all respects.

ARGUMENT

I. The Retirement Board Correctly Applied The Plan's Any-Occupation Standard Of Total And Permanent Disability.

Mr. Mickell argues that "[a]n ordinary person would read the Plan definition of Disability to mean that a Player is Disabled if he is 'substantially prevented

from or substantially unable to engage in any occupation or employment for remuneration or profit' that would afford him 'up to $30,000 per year in earned income." App. Br. at 37. The district court rejected this argument [A1562- 64], and this Court should do the same.

The Plan does not define total and permanent disability by whether a Player is capable of working in a job that earns him more than $30,000 per year. The Plan has an any-occupation standard. *See* PD § 5.2(a) [A0143] (a Player is totally and permanently disabled if he is "substantially prevented from or substantially unable to engage in ***any occupation*** or employment") (emphasis added). Thus, a Player who is employed, or who is capable of being employed, in any occupation will not be entitled to T&P benefits.

The reference to "$30,000 per year in earned income," PD § 5.2(a) [A0143], is a unique exception in this collectively-bargained Plan. As interpreted by the Board, it prevents a Player from being automatically disqualified for T&P benefits "merely because," PD § 5.2(a) [A0143], he earns a modest income—by signing autographs, making celebrity appearances, or selling sports memorabilia, for example. But this exception does not swallow the broader, any-occupation rule that governs under a plain reading of the Plan. As the district court noted:

> The plain language of the Plan clearly does not require the Board to determine whether a Player is capable of working in a job that earns him more than $30,000 per year. Rather, the disability standard is unambiguously based on the ability to engage in ***any*** paid

> employment. The $30,000 exception plainly does not alter that general standard, but merely provides that a Player will not automatically be precluded from satisfying it simply because he receives up to $30,000 per year in income [A1563 (emphasis in original)].

In the history of the Plan, no court has ever held otherwise.

Mr. Mickell's argument that his preferred interpretation is more natural and harmonious fails for two main reasons. First, if the bargaining parties intended the Plan to work as Mr. Mickell suggests, they easily could have defined total and permanent disability as the inability "to engage in any occupation or employment that earns a Player at least $30,000 per year in annual salary." They did not. The bargaining parties adopted an any-occupation standard—and Mr. Mickell's interpretation undoes that standard, it does not harmonize it with the rest of the Plan. Second, it is not enough for Mr. Mickell to offer a reasonable, alternative interpretation. The Plan gives the Board discretionary authority to interpret the terms of the Plan [A0157], and the Court owes deference to the Board's reasonable interpretation. *Blankenship*, 644 F.3d at 1355, n.6. *See also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989) (explaining that when a trustee is granted discretion his interpretation will not be disturbed if it is reasonable); *Rittinger v. Healthy Alliance Life Ins. Co.*, 914 F.3d 952, 957 (5th Cir. 2019) ("[W]e are not asking what is the best construction of [disputed plan language]. We are asking whether [the administrator]'s construction was so egregiously

wrong that it flouts the plan's plain language and constitutes an abuse of discretion. We cannot say that [the administrator]'s interpretation… was so off-kilter as to be an abuse of discretion."). In the words of the district court: The Board's "interpretation is undoubtedly reasonable" [A1563].

Mr. Mickell's related attempt to analogize the Plan's disability standard to Social Security disability criteria is inapt. The Plan's definition of total and permanent disability does not track the Social Security standard; it is fundamentally different. The Plan's General Standard—which is at issue here—focuses on the ability to engage in any occupation, while the Social Security standard focuses on the ability to engage in substantial, gainful activity:

The Plan	**Social Security**
"substantially prevented from or substantially unable to engage in any occupation or employment" — PD § 5.2(a) [A0143]	"unable to engage in any substantial gainful activity" — App. Br. at 38

It is therefore unsurprising that the Social Security Administration employs an income threshold and may award disability benefits if an individual is engaged in minimal (but not ***substantial***) gainful activity. That is not the Plan's General Standard.

Finally, Mr. Mickell's point that his application went forward even though "he was working in an occupation that did not involve signing autographs," App. Br. at 37, n.8, is irrelevant. As the district court correctly noted:

> [G]iven [Mr. Mickell]'s employment at the time of his application, [the Board] was not required to reopen [Mr. Mickell]'s claim merely because his annual income was less than $30,000. But although [the Board] may have gratuitously done so, what matters is that when it did, it applied the correct disability standard in reaching its final determination [A1564].

In addition, Mr. Mickell conveniently overlooks that his application proceeded in no small part because he said he resigned from his employment. *See* Compl. ¶ 28 [A0019] (alleging that, "after a short lived unsuccessful attempted work effort, Mr. Mickell was forced to cease his employment due to his disabilities"); 6/30/14 Ltr. fr. M. Chmielarz [A0897] (administrative appeal noting that Mr. Mickell "attempted to work for about 1 ½ years and finally had to stop…").

II. The Retirement Board's Decision Was Reasonable Because It Was Supported By The Findings Of *Seven* Plan Neutral Physicians.

The arbitrary-and-capricious standard of review is highly deferential to a plan administrator's factual determinations.

> In the ERISA context, [a]buse of discretion review is synonymous with arbitrary and capricious review. This standard requires only that substantial evidence supports the plan fiduciary's decision. Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. A decision is arbitrary only if made without a rational connection between the known facts and the decision or between the found facts and the

> evidence. Moreover, this court's review of the administrator's decision need not be particularly complex or technical; it need only assure that the administrator's decision fall[s] somewhere on a continuum of reasonableness—even if on the low end.

Atkins v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 694 F.3d 557, 566 (5th Cir. 2012) (multiple citations and internal quotation marks omitted; alterations in original). *See Williams v. BellSouth Telecomms., Inc.*, 373 F.3d 1132, 1137 (11th Cir. 2004) ("We use [the arbitrary and capricious standard] to avoid judicial second guessing/intrusion by according the most judicial deference (and thus, the least judicial scrutiny).") (internal citation omitted), *overruled on other grounds by Doyle v. Liberty Life Assur. Co. of Boston*, 542 F.3d 1352 (11th Cir. 2008);

The Board's decision need not be the best decision, or the one the Court might prefer. *See Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 322 (4th Cir. 2008) ("At its immovable core, the abuse of discretion standard requires a reviewing court to show enough deference to a primary decision-maker's judgment that the court does not reverse merely because it would have come to a different result in the first instance."); *Turner v. Delta Family-Care Disab. & Surv. Plan*, 291 F.3d 1270, 1274 (11th Cir. 2002) (upholding plan administrator's reasonable decision, noting that "[i]t is irrelevant that the court or anyone else might reach a different conclusion").

Courts have repeatedly held that a decision to deny benefits can be reasonable even in the face of directly conflicting evidence. *See Jett v. Blue Cross*

and Blue Shield of Ala., Inc., 890 F.2d 1137, 1140 (11th Cir. 1989) ("As long as a reasonable basis appears for Blue Cross' decision, it must be upheld as not being arbitrary or capricious, even if there is evidence that would support a contrary decision."); *Dawson*, 261 F. Supp. 3d at 1287 (a court "must accord deference to" an administrator's decision "even if there is evidence that would support a contrary decision") (quotation marks and citation omitted). This is so because "the job of weighing valid, conflicting professional medical opinions is not the job of the courts; that job has been given to the administrators of ERISA plans." *Corry v. Liberty Life Assur. Co. of Boston*, 499 F.3d 389, 401 (5th Cir. 2007).[9]

"Even if the 'evidence is close,' an administrator does not abuse its discretion in resolving conflicting evidence." *Howard*, 929 F. Supp. 2d at 1288 (quoting *Doyle v. Liberty Life Assur. Co. of Boston*, 542 F.3d 1352, 1363 (11th Cir. 2008)). *See also Boyd v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 410 F.3d 1173, 1179 (9th Cir. 2005) (upholding the Board's determination and noting that

[9] *See also Rittinger*, 914 F.3d at 958-59 (reversing district court ruling that plan administrator abused its discretion, stating: "The district court was only supposed to review for abuse of discretion—*i.e.*, did [the administrator] have more than a scintilla of evidence to support its decision? The district court was not supposed to weigh and balance the evidence."); *Howard*, 929 F. Supp. 2d at 1288 ("'[A] plan administrator is entitled to weigh the evidence and resolve conflicting evidence about the claimant's disability.'") (quoting *Townsend v. Delta Family–Care Disability and Survivorship Plan*, 295 Fed. App'x 971, 977 (11th Cir. 2008)).

"a single persuasive medical opinion may constitute substantial evidence upon which a plan administrator may rely in adjudicating a claim").

Mr. Mickell's claim cannot withstand these fundamental principles of arbitrary-and-capricious review. At most, Mr. Mickell can point to the opinions offered by the physicians and specialists that he retained, which if viewed in the light most favorable to him may support his application for benefits. However, the question is not whether some evidence supported Mr. Mickell's application, but whether the record reasonably supports the Board's decision. *Howard*, 929 F. Supp. 2d at 1286 ("[T]he pertinent question is not whether the claimant is truly disabled, but whether there is a reasonable basis in the record to support the administrator's decision….") (quoting *Crume v. Metro. Life. Ins. Co.*, 417 F. Supp. 2d 1258, 1273 (M.D. Fla. 2006)); *Corry*, 499 F.3d at 402 ("We might well assume, as the district court essentially did, that the totality of Corry's subjective complaints could suffice to establish substantial evidence of disability; nevertheless, '[t]he law requires only that substantial evidence support a plan fiduciary's decisions, including those to deny or to terminate benefits, not that substantial evidence (or, for that matter, even a preponderance) exists to support the employee's claim of disability.'") (quoting *Ellis v. Liberty Life Assur. Co.*, 394 F.3d 262, 273 (5th Cir. 2004), *cert. denied*, 545 U.S. 1128 (2005), internal citation omitted). Here ***seven*** Plan Neutral Physicians evaluated Mr. Mickell, reviewed his

records (including the opinions of his retained consultants), and ***all seven*** provided comprehensive reports that concluded Mr. Mickell was capable of employment despite his claimed impairments.

- Two Plan Neutral orthopedists, Dr. Arlosoroff [A0882- 87] and Dr. Canizares [A1368- 74], found that Mr. Mickell was capable of at least light work, a conclusion nearly identical to that offered by Mr. Mickell's retained consultant, Dr. Lichtblau [A0341].[10] "It is well-settled law that 'individuals capable of performing sedentary-to-light work are not totally disabled' under an 'any occupation' ERISA" plan. *Richey v. Hartford Life & Acc. Ins. Co*., 608 F. Supp. 2d 1306, 1311 (M.D. Fla. 2009) (quoting *Silvey v. FMC Corp. Long-Term Disab. Plan*, 1996 WL 690156, *3 (6th Cir. Nov. 27, 1996) (unpublished)).
- Two Plan Neutral neurologists, Dr. McCasland (A1002- 10) and Dr. Dunne (A1340- 43), along with two Plan Neutral neuropsychologists, Dr. Macciocchi (A1012- 24) and Dr. Ford (A1379- 88), fully evaluated Mr. Mickell's neurological and cognitive complaints, and all four of these physicians found that Mr. Mickell was not totally and permanently disabled.

[10] Dr. Licthblau indicated that Mr. Mickell would need certain accommodations, including that he "should be in a job setting which allows him to take breaks to change positions from sit-to-stand/stand-to-sit frequently" [A0341].

- Finally, Dr. Faber (A1462- 67), a Plan Neutral psychiatrist, evaluated Mr. Mickell at the Board's request following the recommendations of the other Plan Neutral Physicians. He too concluded that Mr. Mickell was employable.

Under the deferential, arbitrary-and-capricious standard of review, it is "indisputable that the medical opinions" offered by multiple "consulting physicians, each of whom are specialists and qualified experts in fields specifically related to [the plaintiff's] symptoms, constitute substantial evidence supporting [the Board's] determination." *Corry*, 499 F.3d at 402. *See Howard*, 929 F. Supp. 2d at 1298 ("Hartford was not wrong or unreasonable to rely on the opinions of two reviewing physicians and a neuropsychologist, and to afford less weight to the opinions of Howard's treating physicians that she was unable to work at her profession."); *Campbell*, 2018 WL 4963118, at *10 ("Dr. Lichtblau's opinion that Plaintiff was incapable of consistent full-time work does not make Hartford's final decision to terminate LTD benefits wrong."). That is particularly true when (i) the Board is entitled to weigh conflicting evidence, *Howard*, 929 F. Supp. 2d at 1288; (ii) it owes no deference to the opinions of Mr. Mickell's retained physicians when doing so, *Dawson*, 261 F. Supp. 3d at 1290; and (iii) the Plan itself expressly states that "Neutral Physician reports… will be substantial factors" in the Board's decision-making. PD § 11.3(b) (A0166).

III. Mr. Mickell Concedes The Board Was Not Required To Generate A Point-By-Point Rebuttal Of The Evidence, And From This Concession It Follows That The Board Did Not Abuse Its Discretion When It Credited The Findings Of The Plan's Neutral Physicians.

Mr. Mickell acknowledges that the Board is not required to generate a point-by-point rebuttal of his evidence, *see Black & Decker Disab. Plan v. Nord*, 538 U.S. 822, 834 (2003) ("courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation"), but he says that "a fair consideration and analysis of the evidence submitted was necessary." App. Br. at 47. This concession begs the question: What was unfair?

During the administrative process, the Board received all of Mr. Mickell's records (and whatever else he cared to submit), provided those records to independent physicians who were experts in the fields encompassing Mr. Mickell's claimed impairments, and asked those physicians to review the records, personally evaluate Mr. Mickell, and provide unbiased, independent conclusions on whether he was capable of employment. The Board reasonably accepted the conclusions of its Plan Neutral Physicians over the evidence that Mr. Mickell submitted, as explained in the final decision letter:

> As noted above, Sections 8.2 and 8.9 of the Plan give the Retirement Board "full and absolute discretion" to determine the relative weight to give information in the administrative record. The Retirement Board noted that some of the evidence you submitted indicated you have certain impairments but did not directly address whether you are totally and permanently disabled (*i.e.*, unemployable) due to those impairments. The Retirement Board considered such evidence, but placed less weight on it compared to other evidence that did directly address the issue of whether you are able to work. As for the evidence that did squarely address the issue, the Retirement Board had more confidence in the reports of the Plan's Neutral Physicians. The Plan's Neutral Physicians are instructed to evaluate Players fairly, without bias for or against the Player, and they typically have experience evaluating Players and other professional athletes. (For these reasons, the reports from the Plan's Neutral Physicians are uniformly accepted and relied upon by both the members of the Retirement Board appointed by the NFL and those appointed by the NFL Players Association.) Here, the Retirement Board also noted that none of the Plan's Neutral Physicians found you to be totally and permanently disabled, and given this unanimity of opinion the Retirement Board credited the conclusions of its Neutral Physicians over any contrary evidence [A1489].

Mr. Mickell tries to escape the unanimous findings of the Plan Neutral Physicians by claiming that all of the evaluations were inadequate in various ways. *See, e.g.*, App. Br. at 50 (listing alleged failures of Plan Neutral evaluations). The district court considered and rejected Mr. Mickell's scattershot complaints [A1565-69], finding that—to the extent the complaints had any foundation whatsoever—they "are not the type [of] irregularities that create 'procedural unreasonableness' sufficient to recast [the Board's] reliance upon the consulting professionals' opinions as being arbitrary and capricious." *Howard*, 929 F. Supp. at 1297

(quoting *Blankenship*, 644 F.3d at 1357, and rejecting similar arguments from Mr. Mickell's attorneys). The Court should adopt the same logic and conclusion.

Mr. Mickell also relies on several cases to shore up his various arguments about how the Board ignored or failed to adequately consider his evidence; all of them are distinguishable. *Oliver* is the only potentially controlling case,[11] but it is fundamentally different because there the plan administrator relied exclusively on record reviews rather than personal evaluations of the claimant. In addition, the plan administrator denied the claim due to a lack of objective evidence of disability, when (i) the plan did not require such objective evidence, and (ii) the administrator and its peer reviewers had actually overlooked or ignored the very type of objective evidence that was supposedly required but found lacking. *See Oliver v. Coca Cola Co.*, 497 F.3d at 1196- 99. Notably, this Court was careful to distinguish *Oliver* from cases like this one, where a plan administrator reasonably denies a claim on the basis of conflicting evidence. *Oliver*, 497 F.3d at 1199 ("Coca–Cola denied Oliver's claim not on the basis of conflicting, reliable evidence—a practice we have upheld—rather, it simply ignored relevant medical evidence in order to arrive at the conclusion it desired.") (citation omitted).

---

[11] *Oliver v. Coca Cola Co.*, 497 F.3d 1181 (11th Cir.), *reh'g granted, opinion vacated in part*, 506 F.3d 1316 (11th Cir. 2007), and *adhered to in part on reh'g sub nom.*, *Oliver v. Coca-Cola Co.*, 546 F.3d 1353 (11th Cir. 2008). *See* App. Br. at 48 ("The Eleventh Circuit's decision in *Oliver* is instructive.").

Citing *Lake*,[12] Mr. Mickell argues that the functional capacity evaluation ("FCE") that his attorneys paid for is unrefuted, "objective evidence of his functional abilities." App. Br. at 46. The Plan does not require an FCE. Courts do not require an FCE. Every day, physicians just like the Plan's Neutral Physicians opine on the disability status of individuals they have examined; plan administrators routinely rely on such opinions; and courts routinely uphold disability decisions based on them. The district court correctly concluded that the Board's "failure in this case to replicate or directly dispute the FCE does not render its decision arbitrary and capricious given that [the Board] did not rely on 'the selective review of the evidence' by non-examining doctors, but on the unanimous opinion of physicians that personally examined Plaintiff and necessarily rejected the conclusions of the Plaintiff's FCE" [A1569].

Pointing to the Northern District of Indiana's decision in *Maiden*,[13] Mr. Mickell renews his argument that the Board and its Plan Neutral Physicians

---

[12] *Lake v. Hartford Life & Acc. Ins. Co.*, 320 F. Supp. 2d 1240 (M.D. Fla. 2004). *See* App. Br. at 44 ("Thus, the FCE findings provide unrefuted, objective evidence of Mickell's functional abilities."); *id*. at 46 ("While Mickell does not claim that the FCE is dispositive of his Disability, it is credible, objective evidence of his functional abilities, the only of its kind in the record, and it should have been considered by the Plan and its evaluators in rendering their conclusions.").

[13] *Maiden v. Aetna Life Ins. Co.*, 2016 WL 81489 (N.D. Ind. Jan. 6, 2016). *See* App. Br. at 52 ("The prejudicial effect of considering co-morbid conditions in isolation was discussed in *Maiden v. Aetna Life Ins. Co*.").

unreasonably considered his conditions "in a silo." App. Br. at 53. The district court found *Maiden* "unpersuasive and distinguishable," because there the "administrator disregarded the opinions of the plaintiff's 'primary care physician… therapist… pain management specialist… neurologist… surgeon… and [ ] psychiatrist' in favor of two of its physicians who merely conducted file reviews" [A1566- 67]. The district court also observed that "the fact that the Plan Neutral Physicians limited their conclusions to areas within their expertise actually supports the reliability of their reports" [A1566], and it questioned what qualified Mr. Mickell's consultant to assess the nature and extent of his impairments across specialties [A1566]. If confined to their areas of specialty as they should be, the opinions of Mr. Mickell's consultants are equally siloed. The rationale driving the *Maiden* decision does not help Mr. Mickell, and does not warrant a reversal here.

Finally, Mr. Mickell discusses *Dimry*[14]—another disability case against the Plan—and argues for the first time on appeal that the Board abused its discretion because it "automatically deferred to the opinions of [the Plan's] hired physicians." App. Br. at 43. *Dimry* is neither controlling nor persuasive authority. The *Dimry* decision turned on the Board's remark that it "uniformly" accepts Plan Neutral

[14] *Dimry v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 2018 WL 1258147 (N.D. Cal. Mar. 12, 2018). *See* App. Br. at 43 (calling *Dimry* "an almost factually identical case").

findings, and the court's failure to grasp that, when read in context, the remark meant that both sides of the Taft-Hartley Board place great confidence in Plan Neutral evaluations and reports.[15] The Board expressed the same sentiment in its decision letter in this case, as Mr. Mickell points out [A1489]. But, with all due respect to the *Dimry* court, a statement simply expressing the Board's collective confidence in its Plan Neutral Physicians does not automatically mean that the Board had no reasonable basis for its decision in this case.

CONCLUSION

The District Court's judgment should be affirmed in all respects.

[15] The *Dimry* court did not understand the Taft-Hartley structure of the Plan, and so it incorrectly assumed that Plan Neutral Physicians could be biased against Players simply because the Plan compensates Neutral Physicians for the evaluations that they perform. Mr. Mickell has never claimed that the Plan's Neutral Physicians are biased against Players, and for good reason. The Board does not fund the Plan, and its members have no personal stake in the outcome of any application for benefits. Moreover, half of the Board members are former Players themselves, and so all else being equal they would very much like to grant Player applications, not deny them. Consequently, a Plan Neutral Physician could not possibly curry favor with the Board by biasing his reports and conclusions against Players. Just the opposite: If a Neutral Physician exhibited bias against Players, the Player members of the Board would remove that physician from the panel. *See* PD § 11.3(a) [A0166] (Plan Neutral Physicians "serve until three members of the Retirement Board agree to remove that Neutral Physician"). The Plan is purposely designed to maintain the neutrality of Plan Neutral Physicians.

RULE 32(g)(1) CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by the Fed. R. App. P. 32(f), this document contains 10,548 words.

2. This document complies with the typeface requirements of Fed. R App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point.

Dated: June 5, 2019

s/ Michael L. Junk
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the United States Court of Appeals for the Eleventh Circuit using the Court's ECF system. I certify that the following counsel of record is registered as an ECF Filer and that they will be served by the ECF system:

Alicia Paulino-Grisham
Disability Insurance Law Group
3201 W Commercial Blvd Ste 227
Fort Lauderdale, FL 33309

Dated: June 5, 2019

s/ Michael L. Junk
Counsel for Appellee